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I. INTRODUCTION

In *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the Supreme Court promulgated a new affirmative defense to employer liability for supervisor harassment of employees.[1] Ostensibly, the defense represented a carrot-and-stick compromise: Enhancing vicarious employer liability with a strict scrutiny standard, while incentivizing the implementation of anti-harassment measures by allowing an employer an affirmative defense against claims by employees who unreasonably failed to utilize effective anti-harassment mechanisms.[2] In theory, the defense makes sense. If employers craft harassment prevention and correction mechanisms and motivate employees to use such mechanisms, fewer instances of harassment should occur and more instances of harassment should be resolved by internal mechanisms rather than through costly suits.

Lower court application of *Ellerth* has perverted this compromise and frustrated Title VII's goals of deterrence and compensation. While lower court application of the *Ellerth* defense continues to solidify into law,

* J.D. Candidate, May 2010, U.C. Hastings College of the Law; B.A. with Distinction in Political Science, May 2007, Iowa State University. This project began in the summer of 2008 as an assignment from Professor David B. Oppenheimer of Golden Gate University School of Law. Professor Oppenheimer engaged me as his research assistant to help examine a proposal by the American Law Institute to extend the *Ellerth* standard for vicarious liability to cases outside the field of sexual harassment. He asked me to research the use of *McGinnis* and the doctrine of avoidable consequences as an alternative to the *Ellerth* standard, focusing on the difference between an affirmative defense protecting the employer from liability (the *Ellerth* approach) and a partial offset to damages (the *McGinnis* approach). With Professor Oppenheimer's encouragement, I have herein turned to the question of how *Ellerth* and *McGinnis* are being applied. I thank him for his guidance. I also thank Hillary Jo Baker and the Women's Law Journal Staff for their invaluable assistance.

1. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). As short hand, this note will often refer to "*Ellerth*" or "the *Ellerth* defense" as the collective ruling.

2. *Ellerth*, 524 U.S. at 765.

academic criticism of the defense rages. Some of these academics have proposed improvements: Adopting a reasonable woman standard or imposing heavier discovery burdens on employers.

In California, strict liability for sexual harassment is imposed by statute. In interpreting this statute, the Supreme Court of California recently decided that the doctrine of mitigation of damages applies to its anti-harassment statute. The strict liability model combined with the doctrine of mitigation creates a system that, in theory, is identical to that created by *Ellerth*. In practice, however, California's model operates much differently than the federal model.

This Note will first explore the context and rationale for the employer liability standard created in *Ellerth*. Section II will then discuss the application of *Ellerth* by lower federal courts, and highlight several patterns of injustice and inconsistency. Finally, section III will review possible reforms to the federal system, including an analysis and endorsement of California's alternative approach.

II. A DECENT SHOT IN THE DARK

The Supreme Court's 1998 *Ellerth* decision, which created the affirmative defense, is best understood as a compromise between competing frameworks of vicarious employer liability. Should employers be held strictly liable for sexual harassment or merely liable where they are negligent in preventing or correcting the harassment? The Supreme Court wrestled with this question for over a decade before deciding *Ellerth*, and the Court's struggles are instructive for understanding the standard it ultimately crafted.

After Congress enacted Title VII of the Civil Rights Act of 1964, it became unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[3] By 1980, Title VII regulatory guidelines and judicial decisions established that actionable discrimination extended beyond *quid pro quo* harassment, wherein employment itself is made directly contingent upon submission to sexual harassment.[4] These guidelines and decisions made clear that actionable discrimination also included so-called "hostile work environment" harassment, wherein a hostile or offensive work environment unreasonably interferes with an employee's work performance.[5]

What remained unclear, however, was the extent to which employers could be held vicariously liable for the harassment of employees by

3. 42 U.S.C. § 2000e-2(a)(1) (West 2009).
4. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).
5. 29 CFR § 1604.11(a) (1985).

supervisors. In 1986, this question reached the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*.[6] The decision did not definitively resolve the employer liability question, but it laid an important foundation upon which the Court relied heavily thirteen years later in *Ellerth*.

Upon being terminated after four years of work, Mechelle Vinson brought suit under Title VII against her former employer Meritor Savings Bank.[7] Vinson alleged she was subjected to constant sexual harassment from her supervisor, Sidney Taylor.[8] Vinson testified that shortly after hiring her, Taylor propositioned her for sex, to which she acquiesced out of fear for her job.[9] Thereafter, Taylor "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions."[10]

After an eleven-day trial, the district court determined that Vinson had not been the victim of *quid pro quo* sexual harassment while employed at the bank, but nevertheless proceeded to analyze the bank's vicarious liability.[11] Because the bank had an express policy against discrimination and Vinson had failed to file a complaint, the court determined that the bank could not be held liable because it was without notice of the conduct.[12]

On appeal, the D.C. Circuit reversed, finding that the district court failed to consider whether Vinson had made out a sexual harassment claim based on hostile work environment.[13] Importantly, the D.C. Circuit also held that employers are absolutely liable for supervisor harassment of employees under Title VII.[14] This argument chiefly relied on Title VII's definition of "employer" as "agent," a word which the court determined indicated Congress's intent to apply the common law of agency liability to Title VII.[15] Under the common law, a principal is vicariously liable for a tort committed by: (a) an agent acting under the principal's actual authority, and (b) an agent purportedly acting on behalf of the principal when apparent authority enables the tort to be committed or concealed.[16] As such, the D.C. Circuit held that employer liability will always attach to supervisor harassment because "the mere existence — or even the

6. 477 U.S. 57, 60 (1986).
7. *Meritor*, 477 U.S. at 60.
8. *Id.*
9. *Meritor*, 477 U.S. at 60.
10. *Id.*
11. *Id.* at 61–62.
12. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 61-62 (1986).
13. *Id.*
14. *Id.* at 63.
15. 42 U.S.C. § 2000e(b); *Meritor*, 477 U.S. at 63.
16. Restatement (Second) of Agency § 219 (1957). *See also* Restatement (Third) of Agency, §§ 7.04, 7.08 (2006).

appearance — of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees."[17]

The Supreme Court affirmed the circuit court's holding that Title VII prohibits both economic *quid pro quo* and noneconomic "hostile or abusive work environment" claims.[18] The Court went on, however, to reject both the trial and appellate court formulations of employer liability. With only a cryptic "see generally" citation to sections 219 through 237 of the Restatement (Second) of Agency, those sections detailing actual and apparent authority, the Court found that "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors."[19] The Court also found that "absence of notice to an employer does not necessarily insulate that employer from liability."[20] Finally, the Court responded to the bank's argument that its anti-discrimination policy should save it from liability. "The mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure" failed to insulate the bank from liability because the policy did not specifically address sexual harassment and because the grievance procedure required Vinson to first complain to her direct supervisor, the alleged harasser.[21] The Court's conclusion foreshadowed what was to come: "Petitioner's contention that respondent's failure [to report] should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward."[22]

In the post-*Meritor* world, two themes emerged. First, courts rigorously distinguished sexual harassment claims between *quid pro quo* and hostile work environment.[23] Employers were subject to "automatic" vicarious liability for *quid pro quo* claims. For hostile work environment

17. *Meritor*, 477 U.S. at 63. Note that this viewpoint would compel the adoption of strict employer liability, something California has adopted by statute.

18. *Meritor*, 477 U.S. at 65-67.

19. *Meritor*, 477 U.S. at 72.

20. *Id.*

21. *Id.* at 73-74. Future courts seem to have turned these identified deficiencies — the promulgation of a policy specifically condemning sexual harassment and a procedural bypass for reporting around supervisors — into a standard for determining the reasonableness of employer policies. While *Faragher* restated these twin-requirements as baseline deficiencies, lower courts have held that satisfaction of these twin-requirements is sufficient to make a prima facie showing of the first prong, shifting the burden to the plaintiff and making summary judgment appropriate. *Compare* Faragher v. City of Boca Raton, 524 U.S. 775, 808-09 (1998), *with* Brown v. Perry, 184 F.3d 388, 396 (4th Cir. 1999).

22. *Meritor*, 477 U.S. at 73.

23. Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 204 (2004). Note that *Ellerth* subsequently critiqued this dichotomy, holding that to state a Title VII claim of sexual harassment one must either show "tangible employment action resulted" or conduct which was "severe or pervasive." *Ellerth*, 524 U.S. at 752-54.

claims, courts applied the "actual-or-constructive knowledge standard" (i.e., negligence) regardless of whether the harasser was a supervisor or a coworker.[24] Second, anti-harassment policies obtained paramount status in employer defenses. One study found that after *Meritor*, the existence of a policy specifically addressing sexual harassment and containing a bypass procedure for reporting around direct supervisors substantially increased the employer's ability to avoid liability.[25]

Read against this backdrop, *Ellerth* can be seen as accepting the agency theory argued by the D.C. Circuit in *Meritor* — that common law agency rules entail that supervisor harassment is advanced by virtue of the supervisor's apparent authority, therefore, employers should be held strictly liable. *However*, the *Ellerth* Court was unwilling to entirely release the floodgates of litigation currently being blocked by the *Meritor* negligence standard.[26]

Wrestling with this dilemma, the Court considered adopting a rule that liability would attach only where the harassing supervisor made "active or affirmative" use of his authority.[27] The Court rejected this rule for the reasons put forth by the D.C. Circuit court in *Meritor*: "Supervisors do not make speeches threatening sanctions whenever they make requests in the legitimate exercise of managerial authority, and yet every subordinate employee knows the sanctions exist."[28]

Ultimately, the Court reached the creative compromise that strict liability should apply, but to mitigate against the "automatic liability" effects of strict liability, employers would have a new affirmative defense.[29] The "active or affirmative" test was not entirely abandoned, however, because the Court limited its application of the defense to hostile work environment claims.[30] As such, employers are strictly liable for *quid pro quo* harassment, i.e., "active" harassment which affects tangible employment status. Examples of such tangible employment actions include "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in

24. Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229, 1237 (1991).

25. Ann Juliano & Stewart J. Scwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 591 (2001) ("Our study shows that when an employer has a program that allows victims to report sexual harassment, plaintiffs are successful barely one-third of the time, far less than in other cases.").

26. *Faragher*, 524 U.S. at 804 ("[T]here are good reasons for vicarious liability for misuse of supervisory authority[, but w]e are not entitled to recognize this theory under Title VII unless we can square it with Meritor's holding that an employer is not 'automatically' liable for harassment by a supervisor.").

27. *Id.* at 804-06.

28. *Id.* at 805.

29. *Id.*

30. *Ellerth*, 524 U.S. at 760-61.

benefits."[31] In contrast, harassment that has not culminated in a tangible employment action must be "severe or pervasive" to constitute a Title VII violation.[32] For these latter hostile work environment claims, employers are strictly liable, but the "defending employer may raise an affirmative defense to liability or damages."[33]

The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[34]

The highly analytical nature of these cases should not overshadow the underlying lives involved. Kimberly Ellerth brought suit against her employer for sexual harassment by her supervisor Ted Slowik.[35] Ellerth claimed that Slowik made "repeated boorish and offensive remarks and gestures" to Ellerth, many of which implied that if Ellerth was "looser" or wore "shorter skirts," "her job would be easier."[36] The district court in *Ellerth* found Slowik's behavior "severe and pervasive enough to create a hostile work environment," but granted summary judgment for Ellerth's employer because Ellerth never reported the incidents and the employer therefore "neither knew nor should have known about the conduct."[37] A divided *en banc* Seventh Circuiteventually reversed in a decision with eight conflicting opinions.[38]

Beth Ann Faragher sued her employer for sexual harassment by two of her supervisors, Bill Terry and David Silverman.[39] The trial court found that Terry and Silverman "repeatedly subject[ed] Faragher and other female lifeguards to 'uninvited and offensive touching,' ma[de] lewd remarks, and sp[oke] of women in offensive terms."[40] The trial court found Faragher's employer vicariously liable, but the Eleventh Circuit reversed, holding, *inter alia,* that the employer had no actual or constructive knowledge of the harassment because Faragher never reported the conduct.[41]

After crafting this new defense, the Court remanded Ellerth's claim so her employer could offer evidence to prove the affirmative defense.[42] As to Faragher's employer, the Court was not so accommodating. Because

31. *Id.* at 761.
32. *Ellerth*, 524 U.S. at 752-54.
33. *Id.* at 765.
34. *Id.*
35. *Id.* at 747-48.
36. *Id.*
37. *Id.* at 749.
38. Jansen v. Packaging Corp. of America, 123 F.3d 90 (7th Cir. 1997).
39. *Faragher*, 524 U.S. at 780.
40. *Id.* at 780-83.
41. *Id.* at 783-84.
42. *Ellerth*, 524 U.S. at 766.

Faragher's employer had "entirely failed to disseminate its policy against sexual harassment" and the employer's complaint procedure did not have a bypass around harassing supervisors, the Court held "as a matter of law that the [employer] could not be found to have exercised reasonable care to prevent the supervisor's harassing conduct."[43]

In addition to justifying its holding as a logical product of common law agency liability principles and existing precedent, especially *Meritor*, the Court asserted that its rule created an incentive system consistent with Title VII's goal of deterrence and the traditional duty of mitigation.[44] According to the Court, Title VII's "primary purpose" was "not to provide redress but to avoid harm."[45] Moreover, the doctrine of mitigation has an established place in our common law of damages.[46] Encouraging employers to "take all steps necessary to prevent sexual harassment from occurring" incentivized employers to be consistent with Title VII's goal of deterrence.[47] Encouraging employees to utilize these preventive measures incentivized employees to be consistent with the common law principle of mitigation.[48] "If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so."[49]

Academics have heavily criticized this incentive rule. Professor Anne Lawton writes, "By hinging liability on a response to harassment that is uncommon, especially in cases involving supervisors, the Court created a legal rule that from its inception was unlikely to promote the state goal of prevention."[50] Professor Theresa M. Beiner similarly argues that the defense's second prong, employee unreasonableness, "does not reflect the manner in which many women respond to harassment," and, as a result, supervisor harassment has flourished.[51] Professor Susan Bisom-Rapp has also criticized the defense's first prong, employer reasonableness, arguing that there is very little empirical evidence that employee educational programming can diminish harassment. Moreover, she argues there is evidence that many programs can have adverse affects which may actually *promote* harassment.[52]

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43. *Faragher*, 524 U.S. at 808-09.
44. *Id.*
45. *Faragher*, 524 U.S. at 806.
46. *Id.*
47. *Faragher*, 524 U.S. at 806.
48. *Id.*
49. *Id.* 806-07.
50. Lawton, *supra* note 24, at 198.
51. Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 117 (2001).
52. *See* Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 3 (2001).

Professor Linda Hamilton Krieger offers a modest defense of *Ellerth* by arguing that although the affirmative defense may not be empirically justifiable, the decision is justifiable in a normative sense: Employers *should* have polices against harassment, they *should* take steps to prevent and correct harassment, and employees *should* report harassment.[53] While this may be an appealing argument for saving *Ellerth* on a purely theoretical plane, it is a weak defense in reality. Although the Court employed normative language and spoke mostly in the theoretical realm of agency law, the Court assuages its own concerns by claiming that its rule will be an effective deterrent against sexual harassment. In making this claim, the Court makes an empirically premised assertion. According to the Court, the rule will be so effective in reality, that many plaintiffs will not have to bring claims because harassing conduct will be remedied before culminating in actionable harassment.

We need not escape into the theoretical heavens in order to defend *Ellerth.* If the goal were simply to eliminate sexual harassment, courts would impose strict liability on employers for all supervisor harassment. But there is also an interest in fairness to employers, which balances against imposing liability without fault. With competing values, compromise is sensible: Impose strict liability for actions made possible only by the principal's delegation of power (e.g., hiring, firing, etc.). But, imposing vicarious liability for hostile work environment claims would seem too sweeping on employers because they are limited in what they can do to prevent such conduct absolutely. In theory, an employer could safeguard itself from liability by not hiring supervisors, but employers need to delegate power and work in order to survive economically. So *Ellerth* crafted a balance: The courts will impose vicarious liability by default, but if an employers has worked hard at preventing and correcting harassment *and* if the employee has chosen not to utilize corrective mechanisms, then the courts will absolve the employer of the preventable damages. If applied with the aim of deterrence and mitigation in mind, the rule should encourage employers to adopt effective preventive and corrective mechanisms that should prevent much harassment. An effective policy, combined with an accessible reporting system, should prevent hostile work environment claims from becoming actionable. Both parties benefit, and fewer resources are consumed by litigation.

Note, however, that employers will only adopt *effective* preventive and corrective polices if courts require them to do so. If courts do not inquire into the effectiveness of employer procedures, the procedures will not necessarily deter harassment. Without judicial inquiry, employers will

53. *See* Linda Hamilton Krieger, *Employer Liability for Sexual Harassment — Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169, 195 (2001).

have no incentive to craft effective policies and employers will be able to secure the benefits of the affirmative defense; however, harassment will not be deterred — not to mention the added tragedy that victims will receive no compensation. Without judicial inquiry into reasonableness of the employer under the first prong and of the employee under the second prong, the *Ellerth* compromise collapses.

III. *ELLERTH* APPLIED: HOW IT GOT SO UGLY

Ellerth's utopian view of eradicating sexual harassment has not been realized. Because it failed to clearly articulate a standard, the Supreme Court is at least partially to blame for the failure of lower courts to apply any sort of standard for employers to show the effectiveness of their preventive and corrective measures.[54] The Supreme Court cannot be held entirely responsible; however, because lower courts are not actually applying *Ellerth*. Lower courts immediately perverted the rule and applied it in a variety of ways to the exclusive and undeserved benefit of employers.

A. A COMPLETE DEFENSE TO LIABILITY

The most striking feature in lower court application of the defense has been the virtual unanimity with which the defense is applied to absolve the employer of all liability.[55] Notwithstanding *Ellerth*'s characterization of itself as an "affirmative defense to liability *or damages*,"[56] lower courts have unanimously applied the defense as a tool for complete liability avoidance.

Ellerth cites the "doctrine of avoidable consequences" as a justification for the affirmative defense it created.[57] *Ellerth* relied on *Ford Motor Co. v. EEOC*, in which the Court held that an employer who violated Title VII was liable to an employee for damages only from the point at which the employee was terminated until the point at which the employer offered to rehire the employee.[58] An employer is liable to an employee for the damages caused from the time at which Title VII is violated until some point in the future where the employee could reasonably prevent further damages without "undue risk or expense."[59] "If the victim could have avoided harm [entirely], no liability should be found against the employer

54. On this point, Professor Bisom-Rapp has argued that one reform to actualize this enforcement is to require employers to produce empirical data supporting their programs. *See* Bisom-Rapp, *supra* note 52. Further discussion on this point is advanced in subsequent sections.

55. The author was not able to find a single case in which lower court application the *Ellerth* defense resulted merely in the reduction of damages.

56. *Ellerth*, 524 U.S. at 765.

57. *Id.* at 764.

58. 458 U.S. 219, 232-35 (1982).

59. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

who had taken reasonable care and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided."[60]

Although lower courts recognize that the *Ellerth* defense is grounded in the "doctrine of avoidable consequences,"[61] these courts have contorted the employee's duty of mitigation such that damages are essentially unobtainable if the employer had in place a policy specifically prohibiting harassment and a complaint procedure with a harassing-supervisor-bypass.[62] Where these policies exist, some circuit courts have declared as a matter of law that employees should always be able to complain about harassment before a hostile work environment is created.[63] The Fifth Circuit held that "[i]f the plaintiff complains promptly, the then-incidental misbehavior can be stymied before it erupts into a hostile environment, and no actionable Title VII violation will have occurred."[64] This reasoning presumes that hostile work environment claims are not created by single incidents, and that if an employee simply complains after the first incident, since a single incident should not yet constitute a Title VII violation, the employee will *always* be able to prevent hostile work environments.[65] "It is, of course, theoretically possible for a supervisor to engage in sufficiently severe conduct (e.g., raping, 'flashing,' or forcibly groping or disrobing the subordinate employee) in such a short period of time that, even though (1) the employee reports the conduct immediately, (2) the employer takes swift and decisive remedial action, and (3) no tangible employment action ensues, the employer could still be held vicariously liable under the *Ellerth* 'severe or pervasive' test."[66] No cases, however, reflect this "theoretica[l] possib[ility]."

The courts' presumption offers a window into the courts' views on how reasonable employees respond to harassment. This viewpoint fails to recognize the substantial psychological, political, and social costs that prevent employees from reporting every incident of harassing conduct.[67] The courts' unrealistic vision of the reasonable employee's response to

60. *Faragher,* 524 U.S. at 807.

61. Akers v. Alvey, 180 F. Supp. 2d 894, 902 (W.D. Ky. 2001) (*rev'd on other grounds*, 338 F.3d 491 (6th Cir. 2003).

62. This requirement flows from *Meritor*, 477 U.S. at 73-74.

63. Indest v. Freeman Decorating, Inc., 164 F.3d 258, 267 (5th Cir. 1999).

64. *Id.*

65. The injustice created by lower courts is therefore not entirely attributable to their misapplication of *Ellerth*. At least some of the injustice results from a perversity in the "severe or pervasive" case law. But lower court misapplication of *Ellerth* clearly exacerbates this perversity.

66. Indest, v. Freeman Decorating, Inc., 168 F.3d 795, 804 n.52 (5th Cir. 1999) (Wiener, J., specially concurring).

67. This argument is expanded in proceeding sections.

harassment has become a central theme in the tragedy of *Ellerth*'s application.

B. FORCING EMPLOYEES TO DISPROVE THE DEFENSE

Ellerth provided that "a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence."[68] The first prong of this defense is proving that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior."[69] *Ellerth* gives little guidance on what should constitute "reasonable care to prevent and correct promptly."

Lower courts have generally found satisfaction of this first prong where the employer merely demonstrates the existence of an anti-harassment policy.[70] Once employers have satisfied this *de minimis* task, the burden shifts to the employee to prove that the employer's policy is ineffective or that the employer otherwise acted unreasonably. Courts essentially never inquire into the social science supporting anti-harassment programs, despite the availability of such data to employers who were genuinely concerned, or who might be made concerned by the imposition of money judgments, with preventing harassment.[71]

Instead of inquiring into the effectiveness of employer procedures, the first prong of *Ellerth* has become a toothless exercise in paperwork for employers and a sword against employees. Courts generally defer to employer definitions of what constitutes an appropriate employee response to harassment, rather than make a judicial determination of how a reasonable employee would respond. In *Ritchie v. Stamler*, the Sixth Circuit rejected a plaintiff's argument that her employer's policy was ineffective because it required her to complain in writing to the president of a large company.[72] In *Jackson v. Arkansas Department of Education*, the Eighth Circuit found that a victim of harassment unreasonably failed to use her employer's remediation mechanism because, although she promptly reported her supervisor's harassing conduct, she refused to confront her harassing supervisor in a remediation conference.[73] In *Coates v. Sundor Brands, Inc.*, the Eleventh Circuit concluded that the question of whether the employer had been given notice of plaintiff's harassment was "made

68. *Ellerth*, 524 U.S. at 765.

69. *Id.*

70. *See, e.g.*, Brown v. Perry, 184 F.3d 388, 396 (4th Cir. 1999); Lissau v. Southern Food Service, Inc., 159 F.3d 177, 182 (4th Cir. 1998) (holding that "evidence that [employer] had disseminated an effective anti-harassment policy provides compelling proof of its efforts to prevent workplace harassment").

71. *See* Bisom-Rapp, *supra* note 52. Subsequent sections expand on this point.

72. 2000 WL 84461, *3 (6th Cir. Jan. 12, 2000).

73. 272 F.3d 1020, 1023, 1025-26 (8th Cir. 2001).

easy" because the employer had defined "notice" in its anti-harassment policy.[74]

The same theme — refusing to apply the defense as an empirically grounded incentivizing device — has played out in the second prong. *Ellerth* required employers to show that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[75] As already noted, courts tend to simply presume unreasonable employee conduct when a hostile work environment results.[76] Courts often frame this presumption in terms of the employee's unreasonable delay in reporting, such that when an employee describes the history of harassment, courts emphasize the temporal gap between the first incident and the date of report.[77] This framing is disingenuous because no amount of delay would be accepted under the courts' logic. Examples abound of plaintiffs who were summarily denied as a result of these "unreasonable delays."

In *Phillips v. Taco Bell Corp.*, in the Eastern District of Missouri, the court dismissed a sexual harassment claim by Rita Phillips against her supervisor Duane Sonntag.[78] The court found that Phillips was subjected to unwanted sexual contact on March 13, June 12, June 14, June 17, and June 18.[79] Phillips formally complained on June 20 of the same year.[80] The court found Phillips' "delay of three months and seven days between the first incident of harassment and a plaintiff's first complaint" to be unreasonable as a matter of law.[81]

In *Conatzer v. Medical Professional Building Services, Inc.*, in the Northern District of Oklahoma, the court rejected a sexual harassment claim by Crystal Conatzer against her supervisor Dale Woodruff.[82] Throughout 2001, Woodruff made numerous sexually inappropriate comments to and initiated frequent unwanted physical contact with Conatzer.[83] On September 28, according to a witness, "[Conatzer] bent over to pick something up or to access a lower drawer for something and

74. 164 F.3d 1361, 1364 (11th Cir. 1999).

75. *Ellerth*, 524 U.S. at 765.

76. *Coates*, 164 F.3d at 1367.

77. Of course, the irony here is that no amount of delay would be sufficient for many courts. "*Faragher* implies that a plaintiff should not wait as long as it usually takes for a sexually hostile working environment to develop when the company has an effective grievance mechanism. If the plaintiff complains promptly, the then-incidental misbehavior can be stymied before it erupts into a hostile environment, and no actionable Title VII violation will have occurred." Indest v. Freeman Decorating, Inc., 164 F.3d 258, 267 (1999).

78. 83 F. Supp. 2d 1029, 1033-34 (E.D. Mo. 2000).

79. 83 F. Supp. 2d 1029, 1033-34 (E.D. Mo. 2000).

80. *Id.* at 1033-34.

81. *Id.* at 1034.

82. 255 F. Supp. 2d 1259, 1271 (N.D. Okla. 2003).

83. *Id.* at 1263-64.

while she was bent over, [Woodruff] placed his hand on her head or neck and directed her head towards his lap and held her there for a second or two."[84] On October 15 of the same year, Conatzer formally complained.[85] The court found Conatzer's delay of seventeen days in reporting this incident, especially in light of the preceding conduct, to be unreasonable.[86]

It seems that courts are more understanding of employer delays in responding to complaints than of employees' delay in reporting. In *Anderson v. Leigh*, the court dismissed an employer's eight-day lapse in responding to Toni Anderson's harassment complaint as a "short delay," while finding that Anderson had unreasonably delayed in reporting the harassment.[87] Anderson had been subjected to harassment on August 23, 24, 26, 29, 31, September 1, 6, and 7, and formally complained on September 7 of the same year.[88]

Despite plentiful scholarship showing the reasonableness of a victim's delay in reporting harassment, courts have refused to develop any framework for considering the reasonableness of delayed reporting. Courts have even refused to adopt the U.S. Equal Employment Opportunity Commission's standards, which recognize that an employee's failure to use an employer's complaint procedure may not be unreasonable if: (a) the employee "reasonably feared retaliation," (b) the procedure involved obstacles like "undue expense," "inaccessible points of contact," or "intimidating or burdensome requirements," or (c) "failure was based on a reasonable belief that the process was ineffective."[89]

The failure of courts to develop a framework for considering the reasonableness of delayed reporting has resulted in outrageous outcomes. In *Walton v. Johnson & Johnson Services, Inc.*, the Eleventh Circuit affirmed summary judgment for the employer on Luanne Walton's sexual harassment claim.[90] Walton claimed to have been raped three times in a two-month period by her supervisor, who brandished his gun while propositioning her.[91] Out of emotional trauma and fear of retaliation, she delayed reporting for two months.[92] The court concluded that *Ellerth* "requires the employee in normal circumstances to make this painful effort *if the employee wants to impose vicarious liability on the employer and*

84. *Id.* at 1264.
85. *Id.*
86. *Id.* at 1270.
87. 2000 WL 193075, *6-7 (N.D. Ill. Feb. 10, 2000).
88. *Id.* at *1-2.
89. The United States Equal Employment Opportunity Commission, Notice No 915.002, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 2 EEOC COMPL. MAN. (BNA) No. 289, at 615:0101 (June 18, 1999), *available at* http://www.eeoc.gov/policy/docs/harassment.html (last visited Nov. 18, 2009).
90. 347 F.3d 1272 (11th Cir. 2003), *cert. denied*, 541 U.S. 959 (2004).
91. *Id.* at 1274-77.
92. *Id.* at 1277, 1289.

collect damages under Title VII."[93] The court's emphasis reflects an attempted moral rationalization: A rape victim need only undergo the burden of immediately initiating an employer's complaint mechanism if she wants to "collect" a money judgment. The problem with this rationalization is that it leaves victims, whose response to harassment is entirely reasonable and predicable, without "compensat[ion] for their injuries"[94] — not to mention that it also leaves harassers undeterred.

To make the situation worse, despite *Ellerth*'s self-characterization as a defense to liability *or damages*, courts employ *Ellerth* as a complete defense to liability. In other areas of tort law, courts undertake complex analyses of multiple causal factors, and reduce damages *pro rata*. For example, courts could adopt a kind of comparative negligence standard in evaluating the employee's failure to report. Where an effective grievance mechanism exists, it is a reasonable conclusion that some causal responsibility rests on the non-reporting employee. But it cannot be said straight-faced that her failure to report caused all of the damage. "[T]he mere existence — or even the appearance — of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees."[95] Nevertheless, courts continue to completely absolve employers of liability, relying on the premise that reasonable employees can prevent hostile work environments before they culminate in Title VII violations.

The implication of this model-reporting-employee viewpoint is the devaluation of the second prong of *Ellerth*, and some courts have actually gone so far as to explicitly eliminate the second prong. In *Indest*, the Fifth Circuit found that *Ellerth* did "not control" in a case where an employer quickly responded to a harassment claim.[96] Although stating that the *Ellerth* defense contains "two necessary elements,"[97] the Fifth Circuit refused to follow *Ellerth* and concluded that "[i]mposing vicarious liability on an employer for a supervisor's 'hostile environment' actions despite its swift and appropriate remedial response to the victim's complaint would thus undermine not only *Meritor* but Title VII's deterrent policy."[98] The Fourth Circuit came to the same conclusion in *Watkins v. Professional Sec. Bureau, Ltd.*:

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93. *Id.* at 1290 (emphasis in original) (quoting *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 35 (1st Cir. 2003). Interestingly, *Reed* overturned a district court decision with similar facts to *Walton*. In *Reed*, a thirty-four-year-old supervisor forced a seventeen-year-old employee to perform oral sex and explicitly threatened retaliation if she reported the incident. 333 F.3d at 30-31.

94. *Ford Motor*, 458 U.S. 219, 230 (1982).

95. *Meritor*, 477 U.S. at 63.

96. *Indest*, 164 F.3d at 265.

97. *Id.*

98. *Id.* at 266.

> Although the Supreme Court did not speak to this issue in *Burlington Industries*, we cannot conceive that an employer that satisfies the first element of the affirmative defense and that promptly and adequately responds to a reported incident of sexual harassment . . . would be held liable for the harassment on the basis of an inability to satisfy the literal terms of the second element of the affirmative defense. Such a result would be wholly contrary to a laudable purpose behind limitations on employer liability identified by the Supreme Court in *Burlington Industries*: to promote conciliation.[99]

Similarly, the Second Circuit redefined the second prong to include either "(a) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise, *or (b) the employee complained and the employer took prompt and appropriate corrective action in response to [the] complaint.*"[100] It is not surprising, therefore, that a survey of sexual harassment cases found that courts almost always awarded summary judgment for the employer where an employer satisfied the first prong of *Ellerth*.[101]

These cases fail to appreciate Ellerth's compromise between two competing goals: fairness to employers and deterrence. Abolition of the second prong perverts this compromise. It returns the standard of employer liability to the pre-*Ellerth* fault-based system without also taking away the defense which *Ellerth* crafted solely to mitigate against the harshness of a strict liability standard.

C. THE OBJECTIFICATION OF *ELLERTH*

Whether by design or effect, lower courts have removed the traditionally fact-intensive analysis of "reasonableness" and objectified the *Ellerth* defense, thus making it highly susceptible to summary judgment. Notwithstanding that *Ellerth* requires an employer to prove it acted reasonably in preventing and correcting supervisor harassment and that the employee acted unreasonably, lower courts have transformed these factually intensive reasonableness inquiries into bright-line objective tests. This has allowed employers to prevail easily via summary judgment by meeting these simple objective tests, and to avoid a fact-intensive jury defense. As already discussed, employers need only show the existence of

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99. 1999 WL 1032614, *5 (4th Cir. Nov. 15, 1999). Referenced in Table of Decisions without Reported Opinions by 201 F.3d 439 (Table) (4th Cir. 1999).

100. Van Alstyne v. Ackerley Group, Inc., 8 Fed.Appx. 147, 152 (2d Cir. 2001) (emphasis added).

101. David Sherwyn, et al., *Don't Train Your Employees and Cancel Your 1-800 Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265 (2001).

an anti-harassment policy in order to satisfy the first prong. Likewise, employers generally need only show that the employee failed to give them notice of the harassment, and "notice" is definable by the employers' own policies. Employers need only show these minimal objective facts to win on summary judgment.

As already discussed, *Ellerth's* empirically premised claims — that effective employer procedures will deter harassment if employees reasonably utilize them — can only be realized if *Ellerth* is applied with an empirical focus. As to the first prong, Professor Lawton has argued that under this objectified system, employers are incentivized to produce polices which no empirical evidence shows to be at all effective (e.g., creating and disseminating policy statements and administrative procedures).[102] That is, because courts have held that the mere existence of an anti-discrimination policy satisfies the first prong, employers are incentivized to do no more effort than create an anti-discrimination policy, regardless of what empirical studies indicate about such policies. Professor Bisom-Rapp has shown that many common anti-harassment policies and training might actually *promote* harassment by polarizing employees' opinions about complainants, encouraging potential aggressors by informing them that most harassment goes unreported, and by luring management into a false sense security.[103]

The importance of a more searching factual inquiry is also important for the second prong, especially where advances in social and medical science indicate that reporting is an exceedingly rare response for victims of sexual harassment. Medical studies now conclude that more than half of rape victims experience Post-Traumatic Stress Disorder ("PTSD").[104] Thus, more likely than not, victims of sexual harassment who have also been raped will experience PTSD, an inference which a jury would likely find reasonably justifies delayed reporting. Moreover, other studies

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102. Lawton, *supra* note 23, at 215 (discussing studies which reveal the ineffectiveness of most employer polices and arguing that employers should focus more to improve organizational culture and understand the predictive value of job gender context).

103. Bisom-Rapp, *supra* note 52, at 30-44. *See also* See Hillary Jo Baker, *No Good Deed Goes Unpunished: Protecting Gender Discrimination Named Plaintiffs from Employer Attacks*, 20 HASTINGS WOMEN'S L.J. 83, 118-19 (2009) ("In *Mitsubishi*, after charges were filed, the plant provided a sexual harassment training session. One of the class members was at the training and observed a male coworker stand up and proclaim to the auditorium, 'I'll tell you one f-ing thing. Whoever turns me in and tries to cause me to lose my job is going to lose theirs too.' No one, including the trainers or manager present, said a thing. In another incident at the plant, someone wrote, 'If any cunt causes me to lose my job, I am going on a cunt hunt,' in the women's bathroom.").

104. Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9, 17 (2001).

suggest reporting harassment is an extraordinarily rare victim response.[105] A 1994 study of federal employees found that while forty-four percent of female and nineteen percent of male federal employees reported being harassed, only twelve percent of those harassed reported the conduct.[106] Another study found that only ten percent of employees reported.[107] Even more troubling than these already dismal reporting rates, Professor Tanya Kateri Hernandez found that women of color were ten times less likely to report harassment.[108] This low reporting is on top of increased rates of harassment against women of color.[109] All of these numbers suggest either that most harassment victims act unreasonably or that lower courts' should reconsider their reasonableness inquiry.

D. PUSHING EMPLOYEES OUT OF DUE PROCESS PROTECTION

Requiring employees to report harassment before it has culminated in a violation of Title VII pushes harassment cases out of courts, where victims are entitled to civil rights protections, and into a system in which corporate efficiency is valued above due process.[110] Internal dispute managers tend to recast legal issues as interpersonal and management issues.[111] Victims who handle complaints in internal dispute systems tend to be without attorney representation and therefore are not fully informed about their legal rights and remedies.[112] Moreover, internal dispute systems tend to deny victims the evidentiary protections afforded by legal rules of evidence (e.g., exclusion of hearsay and evidence of past sexual conduct).[113] Most troubling, employees who complain of only a few single incidents of relatively minor harassment might not be entitled to the protections

105. *See, e.g.*, Sandy Welsh & James E. Gruber, *Not Taking it Any More: Women who Report or File Complaints of Sexual Harassment*, 36.4 CANADIAN REV. OF SOC. & ANTHROPOLOGY 559, 559-60 (1999) (finding that few victims of sexual harassment confront the harasser or report the harassment to their superiors, and that even fewer victims file formal complaints).

106. UNITED STATES MERIT SYSTEM PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGERS 14, 30 (1994).

107. Sharyn A. Lenhar & Diane K. Shrier, *Potential Costs and Benefits of Sexual Harassment Litigation*, 26 PSYCHIATRIC ANNALS 132, 132-33 (1996).

108. Tanya Kateri Hernandez, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & The Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1255-56 (2006).

109. *Id.*

110. Lauren B. Edelman, et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 511 (1993); *see also* Lauren B. Edelman, et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999).

111. Edelmen, *supra* note 110, at 516.

112. Edelmen, *supra* note 110, at 519-20.

113. Edelmen, *supra* note 110, at 520; *see, e.g.*, FED. R. EVID. 412 (limiting admissibility of victim's past sexual behavior).

afforded by retaliation laws if there is no reasonable belief of a Title VII violation.[114]

The transformation of *Ellerth* from a principle of mitigation to a tool for complete liability avoidance, the burden-shifting to employees, and the complete elimination of the second prong all have had the effect of removing the stick from *Ellerth*, so all that now remains is the carrot of liability avoidance. Even this remaining incentive is ineffective as a deterrent to harassment because it is freely given to any employer who merely shows the existence of an anti-harassment policy and a grievance mechanism. An "incentive" system which merely rewards employers for ineffective and possibly harassment-inducing policies is no incentive system at all. *Meritor* recognized that employers should not be shielded from liability unless "[grievance] procedures [are] *calculated* to encourage victims of harassment to come forward."[115] Reform of this system is sorely needed.

III. BEYOND *ELLERTH*

Ellerth was intended to create an incentive structure whereby harassment would be diminished. This emphasis on deterrence was at the cost of some compensation to employees, but the Court believed Title VII's primary purpose was "not to provide redress but to avoid harm."[116] As the Court noted in 1982, "when unlawful discrimination does occur, Title VII's secondary, fallback purpose is to compensate the victims for their injuries."[117] As such, it is particularly tragic that while lower courts have refused to apply *Ellerth* in an incentivizing method, they simultaneously deny compensation to victims of harassment. The current application of *Ellerth* neither deters harassment nor compensates victims.

More troubling still is *Ellerth*'s expansion into other areas of employment law. It would be particularly tragic if the American Law Institute adopted *Ellerth* as an affirmative defense generally applicable to all types of employer liability.[118]

In light of these problems and *Ellerth*'s expansion, it is increasingly important to find a way to address employer liability beyond the *Ellerth* doctrine that dominates our federal courts. Professor Alex Long has

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114. *See* Crawford v. Metro. Gov't of Nashville and Davidson County, 129 S.Ct. 846, 851 (2009).

115. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 74 (1986) (emphasis added).

116. Faragher v. City of Boca Raton, 524 U.S. 775, 805-06 (1998).

117. Ford Motor Co. v. EEOC, 458 U.S. 219, 230 (1982).

118. At the time of printing, the ALI is considering various drafts of the Restatement (Third) of Employment Law. To adopt *Ellerth* as a general principle would be particularly disingenuous given that California and other jurisdictions have refused to follow *Ellerth*. California's approach is discussed below.

persuasively argued for the development of a New Judicial Federalism, where state courts refuse to follow federal precedent in lock-step uniformity without independent reasoning.[119] Following the advice of William J. Brennan Jr.,[120] Long advocates a framework of judicial federalism whereby states apply the rules that make the most sense to them, even where federal courts have already interpreted identical text in federal law to apply a different rule.[121] In this vein, employment law scholars and American Law Institute committee members would do well to consider the alternative approaches to employer liability for supervisor harassment.[122]

A. THE REASONABLE WOMAN STANDARD

In response to courts' unrealistic expectations about how reasonable women respond to harassment, some academics have suggested adoption of a more tailored reasonableness standard. Professor Camille Hebert has argued in favor of judicial adoption of the "reasonable woman" standard or the "reasonable victim" standard as a reform for this "failure to promptly report" cases.[123] Professor Hebert catalogues survey data showing the low rate at which women actually report harassment and found that women provide similar explanations for this response: fear of retaliation, concerns about confidentiality, concern that no action will be taken, harm to the harasser, harm to themselves, fear of not being believed, and fear of being blamed for conduct.[124] Poignantly, Professor Hebert found that women previously subjected sexual harassment were especially unlikely to report the conduct.[125] Professor Hebert concludes that courts should consider this empirical information about real women in considering the reasonableness of a woman's failure to report.[126] After making similar findings of victims'

119. *See* Alex B. Long, *If the Train Should Jump the Track . . . : Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 475 (2006). *See also* Cal. Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 285 (1987) (holding that federal anti-discrimination law is a "floor" and "not a ceiling" for state law).

120. William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) ("[S]tate court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts . . . ").

121. *See* Long, *supra* note 119.

122. Of course, one alternative not discussed in this Note is to eliminate defense entirely, leaving only strict liability. This would increase the cost of harassment, incentivizing employer investment in preventive mechanisms. Moreover, businesses can bear the costs of harassment on their balance sheets more easily than can individual victims. This position also flows from the D.C. Circuit's conclusion in *Meritor* that "the mere existence — or even the appearance — of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees." 477 U.S. at 63.

123. L. Camille Hebert, *Why Don't 'Reasonable Women' Complain About Sexual Harassment?*, 82 IND. L.J. 711 (2007).

124. *Id.* at 737-38.

125. *Id.* at 740.

126. Hebert, *supra* 123, at 742-43.

propensity to report and the reasonable justifications for such responses, Professor Beiner similarly concludes that courts should "listen to the stories of these women and understand the predicament in which sexual harassment places them."[127]

This recommendation is not, however, fully supported. In her modest defense of *Ellerth*, Professor Krieger argues that it does not follow from the fact the women *do not* report harassment that women *should not* be incentivized to report harassment.[128] "Normative and descriptive accounts of human behavior made relevant by legal rules do not and need not always correspond to render those rules sound as a matter of social policy or just as a matter of moral philosophy."[129] Krieger notes that courts likewise do not "listen to the stories" of or adopt tailored reasonableness standards for sloppy surgeons or drunk drivers.[130]

B. GREATER PRODUCTION BURDENS

Professor Lawton concludes her critique of *Ellerth* and the lower court application of it with a call for greater production demands on employers.[131] She argues that employers should be required to produce past complaint records because "if an employer rarely sanctions harassers, even for egregious misconduct, employees may be reticent to invoke the employer's grievance machinery."[132] Lawton argues employers should also be required to produce evidence that the company has monitored past complainants so as to insulate them from retaliation, evidence of employees' evaluations of preventive and corrective mechanisms, and management evaluations screening for compliance with polices.[133]

Even if greater production burdens were not an additional pleading requirement, more effective incentivizing would result if courts borrowed the best-practices model from malpractice tort law.

C. THE CALIFORNIA APPROACH: *MCGINNIS*

While the U.S. Supreme Court has had to infer prohibition against sexual harassment from Title VII,[134] California's Fair Employment & Housing Act (FEHA) expressly prohibits sexual harassment.[135] Section 12940(j)(1) attaches liability to employers for sexual harassment committed by a co-employee or third party only if the employer "(a) knew or should have known of the harassing conduct and (b) failed to take

127. Beiner, *supra* note 51, at 142.
128. Krieger, *supra* note 53, at 195.
129. *Id.*
130. *Id.*
131. Lawton, *supra* note 23, at 266-69.
132. *Id.* at 267.
133. Lawton, *supra* note 23, at 267.
134. Meritor, 477 U.S.at 65.
135. CAL. GOV. CODE § 12940 (West 2009).

immediate and appropriate corrective action."[136] By contrast, section 12940 simply makes sexual harassment of employees by employers and supervisors unlawful, and California courts have interpreted the statute as imposing strict liability for such conduct, regardless of distinctions between *quid pro quo* and hostile work environment claims.[137]

Despite these differences, California courts' interpretation of FEHA has often tracked federal interpretation of Title VII,[138] and after the U.S. Supreme Court announced *Ellerth*, California employers began to argue for the adoption of the defense in California. In 2003, one of these cases, *State Department of Health Services v. Superior Court (McGinnis)*, reached the California Supreme Court.[139]

Theresa McGinnis worked for the California Department of Health Services and in 1995 Cary Hall became her supervisor.[140] McGinnis alleged Hall began harassing her in early 1996 and continued until late 1997.[141] She described an incident in July 1995 in which Hall called McGinnis into his office, and "said he would overlook her attendance problems if she would let him touch her vagina and [he] then proceeded to grab her crotch."[142] In November 1997, McGinnis formally reported Hall's conduct to management, which investigated the claims, determined that Hall had violated the department's sexual harassment policy, and instituted disciplinary action, prompting Hall to retire.[143]

In response to McGinnis's claims against Hall and the Department for violations of FEHA, the Department argued that California should adopt *Ellerth*.[144] The Department argued it had acted reasonably in disseminating an anti-harassment policy and maintaining an effective grievance mechanism through which McGinnis was able to file a complaint which resulted in an immediate investigation and termination of the harassment.[145] Moreover, the Department argued that McGinnis unreasonably failed to utilize the grievance mechanism, which could have prevented much, if not all, of the resulting harm.[146]

The California Supreme Court found that FEHA liability was not constrained by traditional agency law; instead, employers are statutorily liable for all supervisor harassment.[147] Thus, FEHA is not concerned with

136. CAL. GOV. CODE § 12940 (West 2009). Note that this is a negligence standard.
137. Carrisales v. Dep't of Corr., 21 Cal. 4th 1132, 1136 (1999).
138. Reno v. Baird, 18 Cal. 4th 640, 647 (1998).
139. 31 Cal. 4th 1026 (2003).
140. *Id.* at 1035.
141. *Id.*
142. *McGinnis*, 31 Cal. 4th at 1035.
143. *Id.*
144. *McGinnis*, 31 Cal. 4th at 1035-36.
145. *Id* at 1036.
146. *Id.*
147. *Id.* at 1040.

avoiding the "automatic liability" that *Meritor* strives to avoid. A principle basis of *Ellerth* was, therefore, statutorily overruled by FEHA. However, the California Supreme Court held that application of the doctrine of avoidable consequences was consistent with FEHA, and "to the extent the United States Supreme Court grounded the *Ellerth/Faragher* defense in the doctrine of avoidable consequences, its reasoning applies also to California's FEHA."[148]

> We hold, therefore, that in a FEHA action against an employer for hostile environment sexual harassment by a supervisor, an employer may plead and prove a defense based on the avoidable consequences doctrine. In this particular context, the defense has three elements: (1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered.[149]

In principle, *McGinnis* articulated a rule identical to *Ellerth*. Both rules insulate employers from liability for damages where: (a) the employer acted reasonably, and (b) the employee acted unreasonably. *McGinnis* merely clarifies in the third part of its rule what *Ellerth* explains in analysis: An employee's failure to report is not unreasonable if the employer reasonably believed the employer's procedures were ineffective.[150]

The difference between *McGinnis* and *Ellerth* is not, therefore, in their rules, but in their application. California courts have consistently and rigorously held that the doctrine of avoidable consequences is a defense to damages and not liability and therefore summary judgment is not appropriate merely because of avoidable consequences.[151] Although little case law has developed around *McGinnis*, it seems to follow *Ellerth* more accurately than federal courts have: The doctrine of avoidable consequences is an affirmative defense to damages; the burden is on the

148. State Dep't of Health Servs. v. Superior Court (McGinnis), 31 Cal. 4th 1026, 1043-44 (2003).

149. *Id.*

150. *Ellerth*, 524 U.S. at 765.

151. *See, e.g.*, Leung v. Millennium Biltmore Hotel Los Angeles, No. BC 323270, 2007 WL 4843010 (Cal. Super. Ct. April 25, 2007) (summary judgment not appropriate based on avoidable consequences); Griffin v. Port of Oakland, No. 2002-037025, 2004 WL 5050350 (Cal. Super. Ct. Feb. 3, 2004) (same); Garcia v. Brick Container Corp., No. B177110, 2005 WL 2278017 (Cal. Ct. App. Sep. 20, 2005) (reversing summary judgment for employer on *McGinnis* issue); Paul v. HCI Direct, Inc., No. RG03-091369, 2005 WL 5431501 (Cal. Super. Ct. Sep. 9, 2005) (holding that the doctrine of avoidable consequences is a damages rule and may not be used to avoid liability); Skold v. Intel Corp., No. RG04-145635, 2004 WL 5257641 (Cal. Super. Ct. Sep. 29, 2004) (same).

defending employer; the reasonableness questions have not been objectified as in federal courts; and instead, the issue of reasonableness is resolved by juries that listen to the victims' stories.[152]

The dearth of California case law developing *McGinnis* suggests that employers are settling cases instead of allowing juries to hear the harassment stories. If this assumption is correct, California employers should experience higher operating expenses for harassment.[153] An economically rational employer should want to limit these costs by investing in genuinely effective preventive mechanisms.[154]

When cases do not settle, failure-to-report cases go to trial. Juries listen to the victims' stories and judge for themselves whether or not the conduct complained of was reasonable.[155] Although it is not clear whether trial judges are admitting social science evidence about the rarity of reporting by women, at least the jurors are able to hear the full context surrounding the employee's response, perhaps from the victim herself. This approach imposes more costs on employers than the federal system, which in turn motivates employers to invest in preventive mechanisms.[156]

It is difficult to explain why California lower courts are able to apply *McGinnis* while federal courts fail to properly apply *Ellerth*.[157] Partial explanation flows from the cases themselves: *McGinnis* had the hindsight of lower court application of *Ellerth* and explicitly cautioned against such an application.[158] *Ellerth* may also have encouraged lower court

152. *See* Judicial Council of California, CIVIL JURY INSTRUCTION § 2526 (Dec. 2008 Supp.); See CALIFORNIA CIVIL JURY INSTRUCTIONS (BAJI) 12.20.1 (2008 ed.).

153. This assumes the costs of settlement are greater than the costs to obtain summary judgment in federal court.

154. The doctrine of avoidable consequences might also be a more equitable tool for after-acquired evidence cases involving McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 356 (1995) or for mixed-motive cases involving Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

155. *See, e.g.*, Paul, 2005 WL 5431501 (finding that, after *McGinnis*, "a plaintiff can have standing and establish liability for a statutory violation but not be able to recover any monetary damages if the unlawful acts did not cause any monetary loss.").

156. Of course, the same incentivizing might result if federal courts imposed more punitive damages or if Congress adopted something like the treble damage awards available in antitrust law. Harassment, like monopolization, has similarly deleterious effects on interstate commercial markets. Just as customer discrimination stifles the consumer market, employee harassment stifles the labor market. *See* Katzenbach v. McClung, 379 U.S. 294, 300 (1964), *and* Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241, 257 (1964). Employees become less productive, demoralized, and less likely to report harassment in the future, breading a deleterious culture. *See* Hebert, *supra* note 123, at 740 ("[T]he very fact of being subjected to sexual harassment in the workplace may make some women less likely to report the behavior.").

157. This author is, however, unable to cite to any evidence of diminished harassment in California, compared to the rest of the country.

158. State Dep't of Health Servs. v. Superior Court (McGinnis), 31 Cal. 4th 1026, 1043-1044 (2003).

objectification by the dicta following its rule.[159] Moreover, *McGinnis* adopted a simple common law principle for which case law already existed, while *Ellerth* crafted a rule that was not as clearly linked to an established common law rule. A more cynical perspective might suggest that California judges are simply more employee-friendly than federal judges.[160]

D. CONGRESSIONAL ACTION

Some authors have questioned whether courts possess the institutional competence to appreciate the results of social science research and use that data to craft optimal incentives designed to diminish sexual harassment.[161] Accordingly, perhaps the best way to move beyond *Ellerth* lies with the Obama-era Congress. This Congress already has a record for reversing conservative judicial pronouncements relating to women in the workplace.[162] With the high court more conservative than ever,[163] perhaps efforts at reform are better directed to Congress.

IV. CONCLUSION

"Title VII's primary goal, of course, *is* to end discrimination; the victims of job discrimination want jobs, not lawsuits. [But] when unlawful discrimination does occur, Title VII's secondary, fallback purpose is to compensate the victims for their injuries."[164] *Ellerth* tried to create an incentive structure compromise. The burden on employers would increase under a strict scrutiny liability standard, but this standard was mitigated

159. *Ellerth*, 524 U.S. at 765 ("While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.").

160. *But see* Borges v. City of Hollister, No. C03-05670 HRL, 2005 WL 589797 at *1, *22 (N.D. Cal. Mar 14, 2005) (finding that California law relegates the affirmative defense to a damages issue).

161. Krieger, *supra* note 53, at 193.

162. *See* Lilly Ledbetter Fair Pay Act, 123 Stat. 5 (2009).

163. *See* Cass R. Sunstein, *The Myth of the Balanced Court*, THE AMERICAN PROSPECT, Sep. 13, 2007, *available at* http://www.prospect.org/cs/articles?article=the_myth_of_the_balanced_court ("[W]hat was once on the extreme right is now merely conservative. What was once conservative is now centrist. What was centrist is now left wing. What was once on the left no longer exists.") (last visited Nov. 18, 2009), *and* Richard A. Posner, *How Judges Think*, 22 HARVARD UNIVERSITY PRESS (2008) (finding that four of the five most conservative justices in the past seventy years are currently sitting on the court), *and* William A. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* 18-19, 24 (Univ. of Chicago John M. Olin Law & Economics Working Paper No. 404, 2008) *available at* http://ssrn.com/abstract=1126403 (last visited Nov. 18, 2009).

164. *Ford Motor*, 458 U.S. at 230.

somewhat by the affirmative defense. This carrot and stick was to give employers an incentive to craft effective preventive and corrective mechanisms. On the other side, employees gain the ability to make strict liability claims, but were required not to unreasonably fail to utilize their employer's antidiscrimination mechanisms. Each side gave something, lost something, and society gained better workplace environments and diminished litigation — in theory.

Tragically, lower court application of *Ellerth* has broken sticks, leaving only a free carrot available to employers who merely create ineffective policies. Besides failing to entice employers to create effective anti-discrimination mechanisms and deter harassment, lower courts application of *Ellerth* leaves most victims without compensation.

The expansion of *Ellerth* should motivate us to find ways to move beyond it. This Note has explored pathways beyond *Ellerth*, but more work is needed. Social scientists need to continue to study what types of grievance policies are most conducive for victim utilization and what types of things employers do to prevent harassment. If these best practices become better established and more available to employers, the market will probably encourage employers to adopt them — it still costs employers money to defend cases they win on summary judgment. Moreover, if these studies produce a clearer catalogue of employer best practices, courts will be more likely to require that reasonable employers adopt these practices.

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